88-2007

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICARDO J. BORDALLO,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The district court examined and excused jurors in the absence of petitioner and his counsel. The Ninth Circuit held that this was harmless error. The question presented for review is whether this can ever be treated as harmless error.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 30, 1988.

OPINION BELOW

The opinion of the Ninth Circuit is reported at 857 F.2d 519. A copy thereof is appended hereto. (Appendices at A1-A23.) No opinion was rendered by the district court.

JURISDICTION

The judgment of the Ninth Circuit was entered on August 30, 1988, affirming in part and reversing in part petitioner's conviction dated April 6, 1987. (CR 176; Appendices at A1, A23.) The Ninth Circuit denied petitioner's timely petition for rehearing,

and denied in part and granted in part the government's petition for rehearing, all on April 21, 1989. (Appendices at A25.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 20.1.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

48 U.S.C. § 1421b. Bill of rights

. . . . .

(e) No person shall be deprived of life, liberty, or property without due process of law.

. . . . .

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

Fed. R. Crim. P. 43(a). Presence Required

> Defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

STATEMENT OF THE CASE

Petitioner was charged with 17 offenses. (CR 84.) The basis for federal jurisdiction in the district court was 18 U.S.C. § 3231 and 48 U.S.C. § 1424(b). The case was tried by a jury. (RT *passim*.)

Petitioner was acquitted of 7 charges: one count of extortion (18 U.S.C. § 1951), one count of accepting a bribe concerning programs receiving Federal funds (18 U.S.C. § 666), one count of attempting to extort (18 U.S.C. § 1951), and four counts of fraud by wire (18 U.S.C. § 1343). (CR 165.) He was convicted of 10 charges: two counts of conspiracy to extort (18 U.S.C. § 1951), two counts of extortion (18 U.S.C. § 1951), three counts of accepting a bribe concerning programs receiving Federal funds (18 U.S.C. § 666), one count of conspiracy to violate 18 U.S.C. § 666 (bribery concerning programs receiving Federal funds), one count of conspiracy to violate 18 U.S.C. §§ 1512 (witness tampering), 1001 (false statements), 1623 (false declarations before grand jury), and 4 (misprision of felony), and one count of witness tampering (18 U.S.C. § 1512). (CR 176.) The Ninth Circuit reversed petitioner's convictions for the two counts of conspiracy to extort, the two counts of extortion, the three counts of accepting a bribe concerning programs receiving Federal funds, and the one count of conspiracy to violate 18 U.S.C. § 666, and it affirmed his convictions for and authorized the district court to resentence him on the count of conspiracy to violate 18 U.S.C. §§ 1512, 1001, 1623, and 4 and the count of witness tampering. (Appendices at A23, A25.)

The district court examined and excused jurors in the absence of petitioner and his counsel:

Come Now J.E. Hogan, David Lujan, and Ignacio Garcia, defense counsel, and make the following declaration under penalty of perjury.

1. We are the defense counsel for Ricardo J. Bordallo;

2. The Court informed us during pretrial conference that trial would begin with jury selection on January 12, 1987 at 9:00 a.m.;

3. At 8:45 a.m. on January 12, 1987, defense counsel and Defendant were present in the hallway outside the District Court of Guam;

4. The Court was in session. Mr. Hogan asked Mr. O'Connor of the U.S. Attorney's office, "what is going on in the courtroom and can we go in?" Mr. O'Connor answered that, "he didn't know".

5. At about 9:25 a.m., Mr. Hogan was standing by the elevator. He asked a stateside man waiting for the elevator whether he was a prospective juror. The man replied, "not anymore, I'd be out of business if I was sequestered for four weeks".

6. Mr. Garcia overheard prospective jurors tell the Defendant in the hallway that they had been excused from jury duty because they were friends and/or supporters of the Defendant.

7. At 9:29 a.m., Mr. Hogan informed Law Clerk, Jan Rubenstein, in the hallway that he wished to object to jury selection as it was then being conducted. Ms. Rubenstein said she would inform the judge, but never returned to inform Mr. Hogan whether his request would be honored.

8. The Court went on the record with the Defendant and his counsel present at 9:48 a.m.

9. The Defendant interposed an objection to the above situation at the earliest possible moment.

10. Apparently, the Court excused certain prospective jurors for cause without jurors taking an oath.

11. The Defendant has been denied his constitutional right to be present during jury selection. Jury selection is a critical stage of the proceedings.

(CR 100.)

Mr. Garcia: Your Honor, it has come to our attention that some of the jurors have been excused for reasons that we don't know about.

The Court: Well, I'll tell you what the reasons are. Most of the jurors have been excused by virtue of the fact that some of them are taking care of children, and that if they're sequestered, there will be no one to take care of their children. Some of them are single, some of them are separated from their families. So that most of them are excused in that respect.

We have about five or six that have been excused by the court because they came up and they wanted to be excused; they indicated to the court that they cannot be a fair and impartial juror because they worked at TV, or for Governor Bordallo, or their work activity for a candidate, Ada, for example, some of them are even members of certain committees, and they said that they cannot in any way be a fair and impartial juror.

Mr. Garcia: Well, Your Honor, with all due respect to the court, we object to the manner in which the court has released these jurors without the presence of defense counsel.

The Court: Well, your objection will be noted.

(RT 3.)

Mr. Hogan: Your Honor, just for purposes of the record, on behalf of the defendant, we'd like to move for a mistrial at this time.

The Court: On what ground?

Mr. Hogan: On the grounds that we objected to yesterday, and that is that the court apparently discharged certain jurors for an inability to be fair and impartial, for claimed hardships. We don't know whether those jurors were sworn

to answers or responded truthfully. And that as a result of the—the voir dire of the jurors discharged for cause is a critical proceeding in a trial; the defendant is entitled to be present and was not, or have counsel, that we were prejudiced per se, and just for purposes of the record I'd like to move for a mistrial.

Mr. O'Connor: May it please the court, I think that the court's procedure in the instruction of the jury and the swearing in of the jury was eminently fair, it presents no prejudice and entirely consistent with the usual practices of this court which have been established. I think the motion should be denied.

The Court: Do you have anything more to add?

Mr. Hogan: Just to add, I don't think it's been the standard practice of this court to dismiss jurors in this way, at least not in my practice.

The Court: Those were not jurors yet, they were just—

Mr. O'Connor: —veniremen.

The Court: —veniremen.

Mr. Hogan: Well, in that case, it may have violated the—

The Court: They were here pursuant to summons by the court on the basis of the questionnaire they had submitted, and they were asked to come to court for possible jury service. At the end of the instruction, in corroborating—in support of the documentary film which was shown to the veniremen or prospective jurors who appeared in court, the court made its instruction. And in its usual practice in each and every district, at the conclusion of the instruction made by the court to the jury relative to the functions, their responsibilities, for any juror having some good reason to come up and make a request to be excused. Most of the requests that were made to the court have to do with one of the sections contained in the voir dire questionnaire as to, they may be excused if they can show to the court they have

the responsibility of taking care of minor children, and that it will impose hardship. And most of those requests for excuse have to do with mothers whose husbands are—they are not home or they are separated, and that there's no one to take care of their young kids at home. And most of the excuses have to do with that.

Mr. Hogan: I understand.

The Court: Some were excused because of—some of these prospective jurors are conducting their own businesses, or operation, and that if they have to be sequestered for four weeks their business will just cease to exist. And there were only about four or five who requested to be excused because of their close participation to both sides of the candidates, and that—at least that is your main objection is geared to those people, or to everybody who have been excused?

Mr. Hogan: Well, my main objection, Your Honor, is to the dismissal for cause for not being able to be a fair and unbiased juror. My main objection is to—obviously the question must have been posed by them in what trial they were going to serve on, potential jurors for.

The Court: They had not been impanelled yet, they were veniremen.

The motion for mistrial will be denied.

(RT 508-11.)

REASONS FOR GRANTING THE WRIT

Direct Conflict

The Ninth Circuit has rendered a decision in direct conflict with a decision of the Second Circuit on the same matter:

The Ninth Circuit's Decision

Ricardo Bordallo, former Governor of Guam, appeals his conviction, after a jury trial, of criminal charges including extortion, bribery, and witness tampering. . . .

. . . .

Bordallo was elected the Governor of Guam in 1982, and his term was to expire on January 4, 1987. . . .

. . . .

Bordallo's trial commenced on January 12, 1987. On that day, before the proceedings officially began at 9:45 a.m., and while the veniremembers were in the courtroom, the district judge excused some of the prospective jurors. Neither Bordallo nor his counsel were present; although the record is unclear, it appears that the prosecuting attorneys also were not present. The prospective jurors knew which case they would hear if chosen as a juror, and some were excused specifically because they were friends or supporters of Bordallo. Bordallo learned of the district judge's actions through discussions with some excused jurors outside the courtroom.

Almost immediately after formal proceedings began, Bordallo objected to the release of the jurors in his absence. At the conclusion of opening arguments, Bordallo moved for a mistrial on this basis. The court denied the motion, stating that the released jurors were veniremembers not yet impaneled.

Fed. R. Crim. P. 43(a) provides that the defendant "shall be present" at every stage of trial, including the impaneling of the jury.

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed. R. Crim. P. 43(a). Both Bordallo and his counsel were present at the voir dire examination, and in fact, at all proceedings involving the jury from the time that the thirty-nine prospective jurors were sworn.

The defendant's right to be present during the trial emanates from due process. The Supreme Court has held "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Rogers v. United States*, 422 U.S. 35, 38 (1975)(citation omitted); *see also Shields v. United States*, 273 U.S. 583, 588-89 (1927); *United States v. Frazin*, 780 F.2d 1461 (9th Cir.), *cert. denied*, 107 S.Ct. 158 (1986).

There is authority that Rule 43 requires the defendant's presence at the voir dire examination of prospective jurors. *Virgin Islands v. George*, 680 F.2d 13 (3d Cir. 1982); *United States v. Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). Clearly counsel must be present for the examination of the prospective jurors and exercise of peremptory challenges. *See* Fed. R. App. P. 24. At the stage of voir dire, the prospective jurors are questioned about their knowledge of a specific case; the jurors know what case they will hear if selected and know which parties are involved. At least one court has said that "an accused in a capital case has a constitutional right to be continuously present at all stages of the proceedings from arraignment to final sentence, including a proceeding where jurors for the trial of the case are challenged and their qualifications inquired into." *Welch v. Holman*, 246 F.Supp. 971, 973-74 (M.D. Ala. 1965), *aff'd*, 363 F.2d 36 (5th Cir. 1966). But *Welch* did not extend that right to all court contacts with jurors.

It is thus not surprising that there is authority that that the defendant has no right to be present during the drawing of the jury by the jury commissioners. *Pope v. United States*, 287 F.Supp. 214 (W.D. Tex. 1967), *aff'd*, 398 F.2d 834 (5th Cir. 1968), *cert. denied*, 393 U.S. 1097 (1969). The drawing of names is a ministerial act occurring before a specific case is called for trial, and thus does not involve juror qualifications as related to a particular criminal case. As Judge Johnson held in *Welch*, the defendant's right to be present

"does not mean, however, that the judge of a court cannot organize his court and qualify his prospective jurors generally, without bringing into court for such a proceeding each and every defendant who may be tried during the entire term." 246 F.Supp. at 974.

This case falls somewhere between the ministerial stage of drawing the prospective juror pool and the formal pretrial narrowing of the pool through voir dire for a particular trial. We conclude the present situation is more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to Bordallo's particular cause. Although no particular prejudice is alleged here, circumstances could arise in which a judge, either consciously or inadvertently, excused a disproportionate percentage of a juror population, such as women or minorities, *see, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986), or otherwise adversely affected the neutrality of the juror pool. Requiring the defendant's presence before excusing prospective jurors for a specific case protects against such risks. We conclude that either the defendant or his counsel should have been present. Neither was.

However, even if the error amounted to a due process violation, the "violation of a defendant's due process right to be present at all stages of trial is subject . . . to the harmless error rule" of *Chapman v. California*, 386 U.S. 18, 21-22 (1967). *Frazin*, 780 F.2d at 1469. This error was harmless beyond a reasonable doubt. The record is clear that those particular prospective jurors who were released would and should have been released in any event. The court's release of these prospective jurors before voir dire could not have contributed to the verdict. Their release was harmless error.

(Appendices at A3, A4, A6-A9).

The Second Circuit's Decision

Payne argues on appeal that his constitutional and statutory rights were violated when the jury was impanelled in his

absence and that his trial and conviction are therefore defective. The trial was scheduled to begin Wednesday, February 14, 1967, in the Connecticut District Court of New Haven. On Monday morning February 13th, Payne was arrested by State authorities, to whom he gave a fictitious name, in Jersey City, New Jersey, on charges unrelated to this proceeding. On Wednesday morning the United States Attorney's Office in New Haven was notified of Payne's arrest but an attempt to have him brought to New Haven that day was not successful. . . .

Payne was brought to New Haven prior to the first day of trial on Thursday, and the record shows no objection by him or through his counsel to the fact that the jurors were impanelled in his absence. However, there is also no indication that Payne was advised of, or waived, his right to be present.

Article III, § 2 of the Federal Constitution and the Sixth Amendment thereto give the defendant in a criminal case the right to a public jury trial, and it is an elementary principle of due process that a defendant must be allowed to be present at his own trial. In addition, Rule 43 of the Federal Rules of Criminal Procedure provides in pertinent part:

> "The defendant shall be present at the arraignment, at every stage of the trial *including the impaneling of the jury* and at the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." (Emphasis added.)

Rule 43 is derived in part from two early Supreme Court cases, *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892) and *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (cited and discussed in *Lewis*). 18 Moore, Federal Practice § 43.01[2] (1968). In *Hopt* the Court held that in a felony case the trial of challenges to proposed jurors by "triers" appointed by the court must be carried out in the presence of the accused. The failure to have the challenges tried in his presence was reversible error even in the absence of an

objection. In *Lewis* the Court reversed the conviction of a defendant who had not seen the jurors until after the challenges had been made and the jurors selected, holding that the "making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made." 146 U.S. at 376, 13 S.Ct. at 138. . . .

. . . .

The government contends that even if Payne or his counsel had not made an effective waiver prior to trial, Payne's failure to object to the jury panel when he did appear on the 16th and his silence thereafter operates as a waiver. However, there is nothing in the record from which we can infer that Payne was advised of his rights under Rule 43 and that he knowingly and voluntarily agreed to proceed with the jury that had beem impanelled. Compare *Echert v. United States*, 188 F.2d 336 (8th Cir. 1961). On the other hand, if Payne's counsel did discuss this point with him and he agreed to proceed with the jury that had been selected, waiver may be found. Compare *Parker v. United States*, 184 F.2d 488 (4th Cir. 1954) where five witnesses testified in defendant's absence and waiver was found from the fact that the defendant read the transcript of their testimony and from the lack of an objection or a request that they be recalled. Therefore we hold that a remand will be necessary as to Payne to determine the question of understanding waiver. Although similar situations probably will arise infrequently, we suggest that the preferred practice would be for the court to advise the defendant of his right under Rule 43 and, if the defendant so desires, obtain an intelligent and knowing waiver on the record. *Cross v. United States, supra; Echert v. United States, supra.*

Finally, the government argues that a remand is unnecessary because the noncompliance with Rule 43 in this case was harmless error. *Chapman v. United States*, 386 U.S. 18, 21, 87 S.CT. 824, 17 L.Ed.2d 705 (1967). However, the court in *Chapman* also noted that some of "our prior cases

have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." (p—23) A defendant's right to be present while the jury is selected would appear to be such a right. It is true that as a general rule a violation of Rule 43 does not require reversal if the record affirmatively indicates beyond a reasonable doubt that the error did not affect the verdict but the cases supporting the rule involve communications in the absence of the defendant between the court and the jury after deliberations had begun. In contrast, there is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury. While Mr. Ramsey was from New Haven and, therefore, might be more familiar with Connecticut jurors than Payne who was from New Jersey, we can only speculate as to what suggestions Payne might or might not have made, since it would be his prerogative to challenge a juror simply on the basis of the " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' " *Lewis v. United States,* 146 U.S. at 376, 13 S.Ct. at 138. Thus, even if the harmless error principle applies generally to departures from the mandates of Rule 43, the government has not been able to convince us that Payne might not have been prejudiced by being absent.

Therefore, unless the Trial Court determines after a hearing on remand, in accordance with this opinion, that Payne has made a knowing waiver of his right to be present during the impanelling of the jury, a new trial must be granted as to him.

(*United States v. Crutcher,* 405 F.2d 239, 241-43 (1968) (footnotes omitted), *cert. denied,* 394 U.S. 908 (1969).)

Error In Court Below

The Ninth Circuit is wrong. The Second Circuit is right. A violation of a defendant's right to be present while the jury is selected should never be treated as harmless error. There is no

way to assess the extent of the prejudice a defendant might suffer by not being present during the impanelling of the jury. It has an effect which is so inherently indeterminate that as a matter of law it cannot reasonably be found harmless. There is no way of determining its effect on the jury beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Agana, Guam, May 22, 1989.

Respectfully submitted,

HOWARD GUSTAF TRAPP

Counsel of record
for petitioner

(Appendices follow)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICARDO BORDALLO, Governor of Guam, *Defendant-Appellant.*	No. 87-1092 D.C. No. CR 86-00049 OPINION

Appeal from the United States District Court
for the Territory of Guam
Cristobal C. Duenas, District Judge, Presiding

Argued June 15, 1988—San Francisco, California
Submitted July 25, 1988

Filed August 30, 1988

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Robert J. Kelleher,* District Judge.

Opinion by Judge Schroeder

SUMMARY

Criminal Procedure/Criminal Law/Jury

Appeal from a criminal conviction for extortion, bribery and witness tampering. Affirmed in part, reversed in part and

*Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

remanded. The court held that a defendant should be present before excusing prospective jurors.

Appellant Ricardo Bordallo was indicted on criminal charges while serving as the Governor of Guam. The government's case centered on four transactions: (1) the TC&E payoff, (2) the Sood/Sablan transaction, (3) the IT&E payoff, and (4) the Jones gratuity. The charges stemmed from Bordallo's acceptance of cash payments in exchange for the award of government contracts. Bordallo characterized the payments as "campaign contributions" with "no strings attached."

[1] On the day of Bordallo's trial, before the proceedings began, the district judge excused some of the prospective jurors. No counsel or party was present. The prospective jurors knew which case they would hear if chosen as a juror, and some were excused specifically because they were friends or supporters of Bordallo. **[2]** The court denied Bordallo's objection and mistrial motion. **[3]** The orderly conduct of a trial by jury, essential to the protection of the right to be heard, entitles the parties who attend for the purpose to be present at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. **[4]** Requiring the defendant's presence before excusing prospective jurors for a specific case protects against a judge adversely affecting the juror pool neutrality. **[5]** However, in this case, the error was harmless. **[6]** Bordallo contends that his conviction of bribery, under 18 U.S.C. § 666(b), applies to agents of a "state" government, and Guam is not a state. **[7]** Guam is an unincorporated territory, **[8]** not a state. **[9]** Bordallo was charged with witness tampering under 18 U.S.C. § 1512. He violated this section by engaging in misleading conduct. **[10]** The jury could conclude that Carpio's attempt to stop the FBI's investigation was based on misguided loyalty to Bordallo because Carpio believed the funds were going toward a good purpose, as Bordallo had told him. Carpio told the FBI that the funds went to the poor, and obtained a fake receipt to hinder the investigation. This evidence could support a

conclusion that Bordallo misled Carpio. [11] Sablan, Bordallo's campaign manager, participated in the IT&E transaction. He was later charged with extortion and after pleading guilty wrote a "perspective." In it, he reflected upon his involvement in the transaction. [12] Bordallo contends that the "perspective" was both irrelevant and highly prejudicial. [13] Although it should have been excluded as hearsay, [14] it did not so pervade the trial with prejudice so as to constitute an unfair trial. [15] The jury instruction on extortion specifically permitted the jury to find Bordallo guilty of violating the Hobbs Act without making a demand or otherwise inducing the payments. [16] He correctly argues that the conspiracy to extort instruction was erroneous because it was confused with the general conspiracy statute and there was spillover prejudice from the erroneous extortion instruction. [17] The obstruction of justice instruction involved four offenses. [18] One was not challenged on appeal, the other three did not constitute plain error. [19] Nor did the unanimity instruction constitute plain error.

COUNSEL

Howard Trapp, Howard Trapp Incorporated, Agana, Guam, for the defendant-appellant.

K. William O'Connor, United States Attorney, Agana, Guam, for the plaintiff-appellee.

OPINION

SCHROEDER, Circuit Judge:

Ricardo Bordallo, former Governor of Guam, appeals his conviction, after a jury trial, of criminal charges including extortion, bribery, and witness tampering. The charges

stemmed from Bordallo's acceptance of cash payments totaling $79,600 in exchange for the award of government contracts. Bordallo characterized the payments as "campaign contributions" with "no strings attached." On appeal, Bordallo challenges the jury selection process, the sufficiency of the evidence, evidentiary rulings, and the jury instructions. We affirm Bordallo's convictions for witness tampering and conspiracy to obstruct justice. We reverse Bordallo's convictions for bribery, conspiracy to commit bribery, extortion, and conspiracy to commit extortion.

BACKGROUND

Bordallo was elected the Governor of Guam in 1982, and his term was to expire on January 4, 1987. In September 1986, the Guam Federal Grand Jury indicted Bordallo on criminal charges. The Government's case centered on four transactions occurring while Bordallo was Governor. These are characterized in the record as: (1) the TC&C payoff, (2) the Sood/Sablan transaction, (3) the IT&E payoff, and (4) the Jones gratuity.

In the TC&C payoff, Johnny Carpio, owner of an engineering firm and a political supporter of Bordallo, was approached by TC&C, Inc. in September 1984. TC&C offered to make a $50,000 to $100,000 "campaign contribution" to Bordallo in exchange for Bordallo's help in obtaining approval for its proposed scrap metal plant. Carpio conveyed the message to Bordallo. On December 10, 1984, TC&C delivered $50,000 cash to Carpio's office. Carpio kept $10,000 for himself and gave the remaining $40,000 to Bordallo in a manila envelope, stating that it was TC&C's "initial contribution." Two hours later, Bordallo approved the TC&C project. On October 11, 1985 and January 15, 1986, Carpio delivered two more cash "contributions" of $10,000 each from TC&C to Bordallo. Each time Bordallo accepted the money with the rote proclamation, "there's no strings attached."

In the Sood/Sablan transaction, Vinay Sood, owner of another engineering firm and also a Bordallo supporter, was awarded a government contract for a $103,000 project on the condition that Sood hire Herman Sablan, Bordallo's campaign manager.

The IT&E payoff involved $39,000 owed by the Guam Telephone Authority (GTA) to IT&E, a private local telephone corporation. At Sablan's suggestion, GTA, whose chief executive was related to Bordallo by marriage, agreed to pay the $39,000 it owed to IT&E on the condition that IT&E would deliver the funds to Bordallo as a "campaign contribution." GTA paid the bill in two installments. John Borlas, an IT&E executive, delivered the first installment of $9,600 cash to Bordallo in a plain envelope, which Bordallo accepted. The second installment was paid by GTA to IT&E but no payment was made to Bordallo because the FBI's investigation of Bordallo had then become known.

Finally, in the Jones gratuity, Kenneth Jones, owner of substantial business interests on Guam, presented Bordallo with $10,000 cash in a plain envelope as a "present." Jones claimed there were "no strings attached."

On September 3, 1986, the Guam Federal Grand Jury indicted Bordallo on criminal charges. On November 20, 1986, the grand jury issued a superseding indictment charging Bordallo with two counts of conspiracy to commit extortion under 18 U.S.C. § 1951, three counts of extortion under 18 U.S.C. § 1951, four counts of bribery or gratuity under 18 U.S.C. § 666(b), conspiracy to commit bribery under 18 U.S.C. § 371, attempted extortion under 18 U.S.C. § 1951, four counts of fraud by wire under 18 U.S.C. § 1343, conspiracy to obstruct justice under 18 U.S.C. § 371, and witness tampering under 18 U.S.C. § 1512. These counts stemmed from the four transactions previously described and from related conspiracies and coverups.

Bordallo's jury trial on these seventeen counts began January 12, 1987. On February 13, 1987, the unanimous jury convicted Bordallo of ten of the seventeen counts — two counts of conspiracy to commit extortion, two counts of extortion, three counts of bribery or gratuity, one count of conspiracy to commit bribery, one count of conspiracy to obstruct justice, and one count of witness tampering. Bordallo was acquitted of one count of attempted extortion, one count of extortion, one count of bribery or gratuity, and four counts of fraud by wire. The district court sentenced Bordallo to three years imprisonment on each of the ten counts, with the sentence of imprisonment on seven of the counts to run concurrently. The court then suspended the concurrent sentence, leaving Bordallo with a nine-year prison term. The court also sentenced Bordallo to five years probation, to a total of $35,000 in fines, to an assessment fee of $500, and to $79,600 in restitution. Bordallo timely appeals pursuant to 28 U.S.C. § 1291.

DISCUSSION

On appeal, Bordallo challenges (1) the jury selection process, (2) the sufficiency of the evidence, (3) two evidentiary rulings, and (4) four of the jury instructions.

A. *Jury Selection Process*

[1] Bordallo's trial commenced on January 12, 1987. On that day, before the proceedings officially began at 9:45 a.m., and while the veniremembers were in the courtroom, the district judge excused some of the prospective jurors. Neither Bordallo nor his counsel were present; although the record is unclear, it appears that the prosecuting attorneys also were not present. The prospective jurors knew which case they would hear if chosen as a juror, and some were excused specifically because they were friends or supporters of Bordallo. Bordallo learned of the district judge's actions through discussions with some excused jurors outside the courtroom.

[2] Almost immediately after formal proceedings began. Bordallo objected to the release of the jurors in his absence. At the conclusion of opening arguments, Bordallo moved for a mistrial on this basis. The court denied the motion, stating that the released jurors were veniremembers not yet impaneled.

Fed. R. Crim. P. 43(a) provides that the defendant "shall be present" at every stage of trial, including the impaneling of the jury.

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Fed. R. Crim. P. 43(a). Both Bordallo and his counsel were present at the voir dire examination, and in fact, at all proceedings involving the jury from the time that the thirty-nine prospective jurors were sworn.

[3] The defendant's right to be present during the trial emanates from due process. The Supreme Court has held "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Rogers v. United States*, 422 U.S. 35, 38 (1975)(citation omitted); *see also Shields v. United States*, 273 U.S. 583, 588-89 (1927); *United States v. Frazin*, 780 F.2d 1461 (9th Cir.), *cert. denied*, 107 S. Ct. 158 (1986).

There is authority that Rule 43 requires the defendant's presence at the voir dire examination of prospective jurors. *Virgin Islands v. George*, 680 F.2d 13 (3d Cir. 1982); *United*

States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). Clearly counsel must be present for the examination of the prospective jurors and exercise of peremptory challenges. *See* Fed. R. App. P. 24. At the stage of voir dire, the prospective jurors are questioned about their knowledge of a specific case; the jurors know what case they will hear if selected and know which parties are involved. At least one court has said that "an accused in a capital case has a constitutional right to be continuously present at all stages of the proceedings from arraignment to final sentence, including a proceeding where jurors for the trial of the case are challenged and their qualifications inquired into." *Welch v. Holman*, 246 F. Supp. 971, 973-74 (M.D. Ala. 1965), *aff'd*, 363 F.2d 36 (5th Cir. 1966). But *Welch* did not extend that right to all court contacts with jurors.

It is thus not surprising that there is authority that the defendant has no right to be present during the drawing of the jury by the jury commissioners. *Pope v. United States*, 287 F. Supp. 214 (W.D. Tex. 1967), *aff'd*, 398 F.2d 834 (5th Cir. 1968), *cert. denied*, 393 U.S. 1097 (1969). The drawing of names is a ministerial act occurring before a specific case is called for trial, and thus does not involve juror qualifications as related to a particular criminal case. As Judge Johnson held in *Welch*, the defendant's right to be present "does not mean, however, that the judge of a court cannot organize his court and qualify his prospective jurors generally, without bringing into court for such a proceeding each and every defendant who may be tried during the entire term." 246 F. Supp. at 974.

[4] This case falls somewhere between the ministerial stage of drawing the prospective juror pool and the formal pretrial narrowing of the pool through voir dire for a particular trial. We conclude the present situation is more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to Bordallo's particular cause. Although

no particular prejudice is alleged here, circumstances could arise in which a judge, either consciously or inadvertently, excused a disproportionate percentage of a juror population, such as women or minorities, *see, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986), or otherwise adversely affected the neutrality of the juror pool. Requiring the defendant's presence before excusing prospective jurors for a specific case protects against such risks. We conclude that either the defendant or his counsel should have been present. Neither was.

[5] However, even if the error amounted to a due process violation, the "violation of a defendant's due process right to be present at all stages of trial is subject . . . to the harmless error rule" of *Chapman v. California*, 386 U.S. 18, 21-22 (1967). *Frazin*, 780 F.2d at 1469. This error was harmless beyond a reasonable doubt. The record is clear that those particular prospective jurors who were released would and should have been released in any event. The court's release of these prospective jurors before voir dire could not have contributed to the verdict. Their release was harmless error.

B. *Applicability of 18 U.S.C. § 666 to Guam*

[6] Bordallo was charged and convicted of bribery under 18 U.S.C. § 666(b). At the time of the offenses charged, section 666(b) provided:

> (b) Whoever, *being an agent of an organization, or of a State or local government agency*, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined no more than $100,000 or an amount

> equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever was greater, or both so imprisoned and fined.

18 U.S.C. § 666(b)(1984)(emphasis added), *amended* Pub. L. No. 99-646, § 59(a), 100 Stat. 3612 (1986). Bordallo contends that section 666 applies to agents of a "state" government, and Guam is not a state.

The version of section 666(b) in effect at trial applied to "agent[s] of an organization, or of a State or local government agency." 18 U.S.C. § 666(b)(1984). Section 666(d) defined "organization" and "local," and those definitions clearly excluded Guam. "Organization" was defined as "a legal entity, *other than a government*." 18 U.S.C. § 666(d)(2)(1984) (emphasis added). " '[L]ocal' means of or pertaining to a political subdivision *within a State*." 18 U.S.C. § 666(d)(4) (1984)(emphasis added). Only "state" was left undefined.

[7] Officially, Guam is an "unincorporated territory." 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States"). We have previously held that constitutional restrictions on the states' regulation of interstate commerce do not extend to Guam because it is an unincorporated territory. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1287 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). Likewise, we have held that references to an action in "state court" do not include actions in the courts of Guam unless Congress expressly so provides. *Guam v. Landgraf*, 594 F.2d 201, 202 (9th Cir. 1979)(dealing with removal of an action under 28 U.S.C. § 1443(1)).

[8] Guam is not a state. In the absence of express congressional intent to include Guam within the proscriptions of this statute, we cannot hold that the statutory provisions apply to Guam. We therefore are compelled to reverse Bordallo's convictions for three counts of bribery under 18 U.S.C. § 666,

and one count of conspiracy to commit bribery under 18 U.S.C. § 371.

C. 18 U.S.C. § 1512 — Witness Tampering

Bordallo next contends that the evidence does not support his conviction for witness tampering under 18 U.S.C. § 1512. In reviewing the sufficiency of the evidence, we must determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also United States v. Patton*, 771 F.2d 1240, 1243 (9th Cir. 1985). "In reaching our determination, we draw all reasonable inferences favorable to the government." *United States v. Reese*, 775 F.2d 1066, 1071 (9th Cir. 1985); *see also United States v. Vaughn*, 797 F.2d 1485, 1489 (9th Cir. 1986).

As an initial matter, the parties dispute whether the witness tampering charge applies only to Bordallo's contacts with Johnny Carpio, or encompasses contacts with others as well. However, it is clear from the jury instructions that this count was intended to apply only to Bordallo's contacts with Carpio. The jury instructions provided:

> Now with regard to witness tampering, which is a violation provided for under Section 1512, Title 18, United States Code, these are the essential elements. . . —first, that the defendant was engaged in misleading conduct toward Johnny P. Carpio; second, that the defendant did so knowingly with intent, a) to influence the testimony of the witness Johnny P. Carpio before the Federal Grand Jury; b) to hinder, delay, and prevent truthful communication and information to the Federal Bureau of Investigation relating to the commission of a Federal offense.

The applicable version of section 1512 provided:

> (a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —
>
> (1) influence the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to — (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or (D) be absent from an official proceeding to which such person has been summoned by legal process; or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(a)(1982).

[9] Bordallo was charged with violating this section by engaging in misleading conduct. There is some uncertainty as to whether the statute requires the defendant to have misled the witness. The Second Circuit has held that it does. In *United States v. King*, 762 F.2d 232 (2d Cir. 1985), *cert.*

denied, 475 U.S. 1018 (1986), the court held that there was no violation of section 1512 because

> the evidence did not indicate that [the defendant] had misled [the witness] in any way. Rather, "[the defendant], simply and flat-out, tried to persuade [the witness] to lie" to mislead the government.

Id. at 237; *see also United States v. Risken*, 788 F.2d 1361, 1368-69 (8th Cir.)(citing *King* with approval), *cert. denied*, 107 S. Ct. 329 (1986). *But cf. United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984), *cert. denied*, 471 U.S. 1130 (1985)(holding that "urging and advising" witness to testify falsely violates section 1512 without indicating whether there was intimidation or misleading conduct). We find that Bordallo's conviction is supported by sufficient evidence under either standard.

Under the Fifth Circuit's reasoning that "urging and advising" false testimony is sufficient to sustain a witness tampering conviction, the result is clear. Carpio testified that Bordallo asked him to lie to the grand jury.

Under the Second Circuit's precedent, there is no "misleading conduct" if an individual is asked to tell a story that the individual knows is false. *King*, 762 F.2d at 237. However, the Second Circuit has also held that making false statements to convince another to lie in an official proceeding does constitute the misleading conduct required to violate the statute. *United States v. Rodolitz*, 786 F.2d 77, 82 (2d Cir.), *cert. denied*, 107 S. Ct. 102 (1986). "The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury." 786 F.2d at 82.

In this case Johnny Carpio's testimony spans five volumes of the Reporter's Transcript. At the time of the FBI's investi-

gation into the "contributions" received by Bordallo, but before Bordallo asked Carpio to lie to the grand jury, Carpio believed Bordallo used the funds for altruistic purposes. Carpio testified Bordallo had told him on several occasions that the cash "contributions" were used to help the poor, and were not for Bordallo's personal gain. Carpio further testified that when questioned by the FBI about "contributions" to Bordallo, Carpio told the FBI that "as far as I know all political contributions are being used by the Governor to help the people, the poor people in the south." Carpio also testified, "I've always believed all along that [Bordallo] was giving [the money] to the people."

Carpio admitted that he obtained a fake receipt for $58,000 from another individual for the purpose of halting the FBI's investigation of Bordallo. After obtaining the fake receipt, Carpio arranged to meet with the FBI, told them the money had been returned, and gave the FBI the receipt.

[10] Taking the view most favorable to the verdict, the jury could conclude that Carpio's attempt to stop the FBI's investigation was based on misguided loyalty to Bordallo, because Carpio believed the funds were going toward a good purpose. Carpio told the FBI that the funds went to the poor, and obtained a fake receipt to hinder the investigation. This evidence could support a conclusion that Bordallo misled Carpio.

Bordallo also contends there was insufficient evidence for the jury to find that Bordallo intended to hinder the FBI investigation. The jury here could have concluded that Bordallo initially knowingly misled Carpio, intending that Carpio would offer Bordallo's explanation concerning the funds to the FBI. *See Rodolitz*, 786 F.2d at 82.

Sufficient evidence supported Bordallo's conviction for witness tampering.

D. *Evidentiary Rulings*

Bordallo challenges two of the district court's evidentiary rulings: (1) the admission of the Sablan "perspective," and (2) the admission of the testimony of an attorney. The district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Olsowy*, 836 F.2d 439, 443 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1299 (1988).

1. *Sablan "perspective"*

[11] Sablan was Bordallo's campaign manager, and participated in the IT&E transaction. Sablan was later charged with extortion, and after pleading guilty to that charge, he wrote a "perspective." In this "perspective," Sablan reflected upon his involvement in the transaction and described his view of the political attitudes on Guam.

[12] Bordallo contends that the "perspective" was both irrelevant and highly prejudicial. The "perspective," as read before the jury, provided in relevant part:

> In reflecting upon my involvement in the Guam Power Authority/Commerical Port case, I see it as a symptom of what is really becoming a malignant cancer of corrupted attitudes. . . . It has gotten to the point where, if you don't contribute, you don't get any government business. . . . When political leaders accept gifts and free trips, or promise contracts yet unannounced, they essentially are expressing to the people that only "they" can do it, or that this is an acceptable standard. When Government does not deposit employees' contributions to their retirement fund for credit union, it displays another disregard for ethics. . . . Agency Heads see these, and some, finally succumb to temptations. Then other subordinates begin to pick up the practice. Favors become obvious — exceptions made become obvious. These

> practices have infested the Government "principle." It has taken over the system. The cancer has spread. . . . I am in total agreement of doing away with a corrupted system — of cleaning up. We need to bring back a sense of fair play — clean competition. We need to leave something better for our kids.

[13] Admitting the "perspective" into evidence was error. The district court should have excluded the "perspective" as hearsay. There was no significance to the fact that Sablan had written a "perspective"; the significance of the "perspective" was in its content. The "perspective" was offered to prove the truth of the matter asserted — that payoffs were common — and therefore it constituted hearsay evidence. *See* Fed. R. Evid. 801(c). Moreover, the "perspective" was irrelevant because even if payoffs were common, this does not establish Bordallo's involvement in any payoffs.

[14] However, the erroneous admission of hearsay evidence does not always constitute reversible error. Other evidence at Bordallo's trial concerned the prevalence of Guam's corrupt political climate. Sablan personally testified at the trial as to his opinion of Guam's political climate before his "perspective" was introduced into evidence, and other witnesses testified as to cash payoffs. The "perspective" comprised four pages out of more than 3600 pages in the trial record. The "perspective" did not "so pervade the trial with prejudice so as to constitute an unfair trial." *United States v. Nace*, 561 F.2d 763, 769 (9th Cir. 1977)(no error in refusing to grant motion for mistrial where challenged interchange comprised three pages of 1680-page trial record and interchange not so prejudicial as to render trial unfair).

Admitting the "perspective" constituted harmless error.

2. *Carbullido's testimony*

Bordallo contends that Phil Carbullido, in his capacity as an expert witness, improperly offered a legal opinion that

Bordallo was guilty of wrongdoing. Carbullido is a Guam attorney and was a member of Bordallo's Advisory Council.

Carbullido offered no legal opinion as to Bordallo's guilt. Carbullido was called as a Government witness, and on direct examination he testified that he was an attorney, that he served on Bordallo's Advisory Council, and that Rose Ramsey, Bordallo's deputy chief of staff, sought his legal advice regarding the propriety of a campaign contribution. Carbullido testified as to the questions Ramsey had asked of him and the advice he offered to her. Carbullido then testified that he resigned from his position on Bordallo's Advisory Council due to the contributions described to him by Ramsey.

None of Carbullido's testimony was improper or prejudicial. There was no abuse of discretion in its admission.

E. *Jury Instructions*

Bordallo challenges four of the district court's jury instructions. Bordallo contends: (1) the instruction as to extortion was plain error because the jury was not told that a demand is necessary under the Hobbs Act; (2) the conspiracy to extort instruction was plain error because it was confused with the general conspiracy statute and there was spillover prejudice from the erroneous extortion instruction; (3) the instruction as to conspiracy to obstruct justice constituted reversible error because the indictment charged Bordallo with four offenses in the obstruction of justice charge but the jury was only instructed on the elements of one of those offenses; and (4) the district court erred by giving a general, rather than a specific, unanimity instruction.

In reviewing jury instructions, we give the trial judge "substantial latitude" so long as the instructions "fairly and adequately cover the issues presented." *United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982). "[A] single instruction to a jury may not be judged in artificial isolation,

but must be viewed in the context of the overall charge." *United States v. Park*, 421 U.S. 658, 674 (1975), *quoting Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985). "Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the trial court's discretion." *Green*, 745 F.2d at 1209.

Bordallo did not object to two of the four instructions now challenged on appeal — the obstruction of justice instruction and the unanimity instruction. Because there was no objection to those instructions at trial, we review those instructions under the "plain error" standard. *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986). "Reversal of a criminal conviction on the basis of plain error is an exceptional remedy, which we invoke only when it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Id.*; *see also United States v. Paris*, 827 F.2d 395, 398 (9th Cir. 1987). Rarely will an improper jury instruction justify a finding of plain error. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *United States v. Glickman*, 604 F.2d 625, 632 (9th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980).

1. *Extortion instruction*

Bordallo contends that the extortion instruction constituted error because the jury was not told that a demand is necessary under the Hobbs Act. The Hobbs Act provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do

> anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. . . .
>
> (b) As used in this section — . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951.

[15] The jury instruction on extortion specifically permitted the jury to find Bordallo guilty of violating the Hobbs Act without making a demand or otherwise inducing the payments. It provided:

> In an extortion under color of official right, it does not matter whether the public official induces, urges or persuades payments to perform his duties or not to perform his duties, so long as there is a wrongful taking by the public official. As long as the victim's motivation for the payment is based upon the recipient's office, and there is a wrongful taking by the public official, the conduct violates Section 1951 of Title 18, United States Code. . . .

However, we recently held in *United States v. Aguon*, No. 85-1318 (9th Cir. July 1, 1988)(en banc), that inducement is a necessary element for conviction under the Hobbs Act. Slip op. at 7873. Because the instructions permitted the jury to convict Bordallo based upon a wrongful taking without inducement, we must reverse Bordallo's two convictions for extortion under 18 U.S.C. § 1951.

2. *Conspiracy to extort instruction*

[16] Bordallo argues that the conspiracy to extort instruction was erroneous because it was confused with the general

conspiracy statute and there was spillover prejudice from the erroneous extortion instruction. We agree. The errors here are identical to those presented in *Aguon*.

> Conspiracy to obstruct justice and conspiracy to commit mail fraud were treated as identical with conspiracy to extort, as though all three crimes of conspiracy were offenses under 18 U.S.C. § 371. The general conspiracy statute, for whose violation Congress has provided a maximum penalty of five years, was not distinguished from the relevant statute, whose violation carries with it a maximum penalty of twenty years. The confusion of the two statutes in the instruction of the court was plain error.
>
> In addition, as the jury had been erroneously instructed on the crime of extortion, there was substantial prejudice to the defendant on the charge of conspiracy to extort — prejudice that spilled over from the instruction on extortion. Believing that it could convict on extortion without corrupt intent, the jury may well have concluded that the extortion Aguon was convicted of under Counts Two and Three was evidence of her participation in the conspiracy under Count One.

Slip op. at 7882.

We likewise must reverse Bordallo's two convictions for conspiracy to commit extortion under 18 U.S.C. § 1951.

3. *Obstruction of justice instruction*

[17] Bordallo next contends that the obstruction of justice instruction involved plain error. The indictment charged Bordallo with four offenses in the obstruction of justice charge: (1) witness tampering under 18 U.S.C. § 1512, (2) false statements under 18 U.S.C. § 1001, (3) false declarations

before the grand jury under 18 U.S.C. § 1623, and (4) misprision of a felony under 18 U.S.C. § 4. The district court instructed the jury as to the elements of witness tampering, but did not address the remaining three offenses. Bordallo contends that the district court's failure to instruct the jury on the elements of the three remaining offenses requires us to reverse his conviction on this count. Because Bordallo did not object to this instruction below, we review for plain error. *Bustillo*, 789 F.2d at 1367.

[18] The district court instructed the jury as to the elements of witness tampering under 18 U.S.C. § 1512, and those instructions are not challenged on appeal. The district court's failure to instruct the jury as to the other three offenses does not constitute plain error.

4. *Unanimity instruction*

Finally, Bordallo contends that the district court erred in giving a general, rather than a specific, unanimity instruction. Bordallo did not object to this instruction below, so we review for plain error. *Bustillo*, 789 F.2d at 1367.

The jury instruction on this issue provided:

> Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. . . .
>
> Forms of verdict have been prepared for your convenience. There are 17 counts, there are 17 verdict forms. In other words, there is a verdict form for each of the 17 counts.
>
> I'll give an explanation as to how to fill these forms. If, ensuing your deliberation, it is the unanimous determination of each and every one of the 12

> jurors, let's say on Count One, conspiracy to commit extortion in violation of Section 1951 of Title 18 of the United States Code, that the defendant is not guilty of the offense, then there is a space in front of the word "Not Guilty," you should put an X in that particular box to indicate that particular verdict to which each and every one of you have agreed. If on the other hand it is the unanimous agreement of each and every one of you, ensuing your deliberation in this particular count that the defendant is guilty of the count as charged, you should then place an X mark on the space in front of the word "Guilty." And then have the foreperson which you have selected affix his or her signature, and then fill in the date in which this verdict has been reached, and there's a blank space there to indicate the date, the date in which you, the jurors, have agreed as to what that verdict is in that particular count. Then you should do likewise for each and every one of the 17 counts, follow the same procedure.

Bordallo argues that the jurors' mere agreement on guilt is insufficient. Instead, Bordallo contends that the jury had a duty to agree unanimously to a particular set of facts. However, the instruction on its face requires unanimity as to each count.

It is also significant that after the jurors were excused to begin deliberations, they requested a definition of "unanimous" from the court. The district judge held a conference in chambers with counsel from both sides, and all agreed that "unanimous means all the jurors must agree to each verdict on each count."

[19] In *United States v. Ferris*, 719 F.2d 1405 (9th Cir. 1983), we noted that in the ordinary case, a general instruction requiring a unanimous verdict will suffice. *Id.* at 1407.

> Unanimity, of course, means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense. . . . We would consider it appropriate for the trial court to instruct the jury to this effect. In the routine case, however, failure to adopt this formulation is not error.

Id. Because the instruction required the jurors to reach unanimous agreement as to each count, and provided a verdict form for each of the seventeen counts, the lack of a specific unanimity instruction did not constitute plain error.

CONCLUSION

We REVERSE Bordallo's convictions for three counts of bribery under 18 U.S.C. § 666, one count of conspiracy to commit bribery under 18 U.S.C. § 371, two counts of extortion under 18 U.S.C. § 1951, and two counts of conspiracy to commit extortion under 18 U.S.C. § 1951. We AFFIRM Bordallo's convictions for one count of witness tampering under 18 U.S.C. § 1512 and one count of conspiracy to obstruct justice under 18 U.S.C. § 371. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICARDO BORDALLO, Governor of Guam, *Defendant-Appellant.*	No. 87-1092 D.C. No. CR 86-00049 (Territory of Guam) ORDER

Filed April 21, 1989

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Robert J. Kelleher,* District Judge.

ORDER

In its petition for rehearing, the government points out that our opinion in this case, 857 F.2d 519 (9th Cir. 1988), ordered a reversal of those counts on which the district court had sentenced the appellant to a period of incarceration. The opinion affirmed only those counts on which the district court had sentenced appellant to probation. The government asks that we amend our opinion in order to authorize the district court to resentence the appellant on the counts that have been affirmed. This court has the authority to do so. *See United States v. Minor,* 846 F.2d 1184, 1187 (9th Cir. 1988); *United States v. Hagler,* 709 F.2d 578 (9th Cir.), *cert. denied,* 464 U.S. 917 (1983).

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*Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

Upon due consideration of the government's motion and the appellant's response, the government's request is granted. The mandate in the case shall authorize the district court to resentence the defendant on those counts which this court has affirmed.

The government's petition for rehearing is in all other respects denied. The appellant's petition for rehearing is also denied.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JUL 20 1989
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No. 88-2007

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICARDO J. BORDALLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied harmless error principles to petitioner's claim that the trial court violated his right to be present at all trial proceedings by excusing some potential jurors before calling the case for trial and swearing the venire.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 857 F.2d 519.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. In an order dated April 21, 1989, the court of appeals granted the government's petition for rehearing in part and denied petitioner's petition for rehearing. The petition for a writ of certiorari was filed on June 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Territory of Guam, petitioner was convicted on two counts of conspiracy to commit extortion, in violation of 18 U.S.C. 371; two counts of extortion, in violation of 18 U.S.C. 1951; one count of conspiracy to commit bribery, in violation of 18 U.S.C. 371; three counts of bribery, in violation of 18 U.S.C. 666(b) (Supp. III 1985); one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and one count of witness tampering, in violation of 18 U.S.C. 1512. He was sentenced to a total of nine years' imprisonment, five years' probation, $35,000 in fines, and $79,600 in restitution. The court of appeals affirmed petitioner's convictions for conspiracy to obstruct justice and witness tampering, but reversed the remaining convictions, holding that 18 U.S.C. 666(b) (Supp. III 1985) did not apply to officials of Guam and that the jury instructions on the extortion counts were erroneous. The court of appeals remanded for further proceedings, including resentencing. Pet. App. A1-A23.

1. The evidence at trial showed that, while he was the Governor of Guam, petitioner accepted money from several local businessmen in exchange for government contracts and other favors. Petitioner misled one of the businessmen, Johnny Carpio, into believing that the money he paid was used to help the poor. Carpio recounted that false version of events to the FBI. Later, acting on his belief that petitioner was not acting for personal gain, Carpio attempted to halt the investigation by preparing a false receipt and telling the FBI that petitioner had repaid the money he had received from Carpio. Petitioner also asked Carpio to testify falsely before the grand jury. Pet. App. A4-A5, A12-A14.

Petitioner's trial began on January 12, 1987. While the potential jurors who had been summoned for the trial were in the courtroom, but before they had been sworn or the case had been called, the district court excused some of them. Petitioner, his counsel, and the prosecutor were not present in the courtroom at the time. Petitioner's counsel learned of the court's action and, after the case had been called, entered a general objection. The court explained that it had excused some potential jurors because they were responsible for taking care of children; five or six others were released because they indicated "that they cannot be a fair and impartial juror because they worked at TV, or for [petitioner], or their work activity for a candidate." Pet. App. A6-A7; C.A. E.R. 46.

The court swore the 39 remaining members of the venire and began voir dire. Petitioner and his counsel were present from the time the case was called to the completion of the trial. After the jury had been sworn and counsel had completed opening arguments, petitioner moved for a mistrial. Pet. App. A6-A7. The district court denied the motion. The court reiterated that it had released individuals who demonstrated that they were responsible for taking care of minor children, businesspeople whose businesses would cease to exist if they were sequestered during a four-week trial, and four of five persons who asked to be excused because of "their close participation to both sides of the candidates"—*i.e.*, their political activities for or against petitioner or his political allies. C.A. E.R. 53-54; Pet. App. A6.[1]

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[1] The court also explained that the procedure it had followed was in keeping with its usual practice. After showing an instructional film and instructing the jury as to their responsibilites, the court stated, it routinely invited potential jurors having good grounds to come forward and make a request to be excused. C.A. E.R. 52-53.

2. The court of appeals affirmed in part, reversed in part, and remanded. With respect to the question presented by the petition, the court observed that Fed. R. Crim. P. 43 gives a defendant a right to be present during voir dire and when peremptory challenges are exercised, but not when a jury commissioner draws the names of potential jurors. Pet. App. A8. Noting that this case "[fell] somewhere between the ministerial stage of drawing the prospective juror pool and the formal pretrial narrowing of the pool through voir dire for a particular trial," the court concluded that this case was "more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to [petitioner's] particular cause." *Ibid.* Accordingly, it ruled that petitioner or his counsel should have been permitted to be present when the district court excused the potential jurors in question. *Id.* at A8-A9.

The court concluded, however, that any error was harmless beyond a reasonable doubt. It found that "[t]he record is clear that those particular prospective jurors who were released would and should have been released in any event" and that the district court's release of those potential jurors "could not have contributed to the verdict." Pet. App. A9.

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals erred in applying harmless error analysis to his claim that the district court violated his right to be present when it excused potential jurors before calling his case for trial. In his view, "[a] violation of a defendant's right to be present while the jury is selected should never be treated as harmless error." Pet. 13. This Court's cases foreclose that contention, however, and there is no conflict among the

circuits that calls for the Court's attention. Further review is not warranted.

1. Fed. R. Crim. P. 43(a) and the Due Process Clause grant a criminal defendant the right to be present during his trial.[2] This Court has made clear, however, that any violation of that right is subject to conventional harmless error analysis. *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983); *Rogers* v. *United States*, 422 U.S. 35, 40 (1975) (a "violation of Rule 43 may in some circumstances be harmless error"). *Rushen* and *Rogers* are consistent with many other decisions in which the Court has refused to characterize a variety of pretrial and trial errors as reversible per se.[3] Indeed, as the Court stated in *Rose* v. *Clark*, 478 U.S. 570, 579 (1986):

> [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that

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[2] Fed. R. Crim. P 43(a) states:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

[3] See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); *United States* v. *Lane*, 474 U.S. 438 (1986); *United States* v. *Hasting*, 461 U.S. 499 (1983). In *Lane*, for instance, the Court flatly rejected the notion that procedural errors can be categorically predetermined to be inherently prejudicial or reversible per se. Referring to the general harmless error provision in the Federal Rules of Criminal Procedure, the Court stated (474 U.S. at 448 n.11):

> [O]n its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction.

any other errors that may have occurred are subject to harmless-error analysis.

Consistent with those authorities, the courts of appeals have frequently applied the harmless error doctrine to claims that a defendant has been deprived of the right to be present during a portion of a jury selection proceeding. See, *e.g.*, *United States* v. *Gordon*, 829 F.2d 119, 127-129 (D.C. Cir. 1987); *United States* v. *Willis*, 759 F.2d 1486, 1500 (11th Cir.), cert. denied, 474 U.S. 849 (1985); *United States* v. *Washington*, 705 F.2d 489, 496-498 (D.C. Cir. 1983); *United States* v. *Alessandrello*, 637 F.2d 131, 137-144 (3d Cir. 1980), cert. denied, 451 U.S. 949 (1981); *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1258-1259 n.47 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983); *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978); *Henderson* v. *United States*, 419 F.2d 1277, 1278 (5th Cir. 1970); *Baker* v. *United States*, 401 F.2d 958, 964-966 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970).

2. There is no conflict between the court of appeals' decision and *United States* v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969), that warrants this Court's review. In *Crutcher*, the defendant was absent during the entire jury selection proceeding, including voir dire and challenges to potential jurors. The Second Circuit observed in dictum that a defendant's right to be present during those proceedings "would appear" to be a right whose violation could not be considered harmless, since there was "no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury." 405 F.2d at 244. But the court also acknowledged that "as a general rule a violation of Rule 43 does not require reversal if the record affirmatively indicates beyond a reasonable doubt

that the error did not affect the verdict," and it concluded (*ibid.*):

> [E]ven if the harmless error principle applies generally to departures from the mandates of Rule 43, the government has not been able to convince us that [the defendant] might not have been prejudiced by being absent.

In its subsequent decisions, the Second Circuit has not viewed *Crutcher*'s dicta as expressing a firm position on the question whether conducting jury selection in the defendant's absence is per se reversible error. In *United States* v. *Toliver*, 541 F.2d 958, 964 (2d Cir. 1976) (emphasis added), *Crutcher* was described only as having "indicated * * * that a defendant's absence during the empanelling of the jury *might be* too basic to be treated as harmless." In *Toliver* and *United States* v. *Fontanez*, No. 88-1567 (June 13, 1989), the Second Circuit applied the harmless error rule to claims that trial courts had conducted proceedings outside the defendants' presence, although it concluded in both cases that the error had been prejudicial. See also *United States* v. *Dioguardi*, 428 F.2d 1033, 1039-1040 (2d Cir.), cert. denied, 400 U.S. 825 (1970) (no reversible error in conducting sidebar discussions during jury selection outside defendants' earshot). In view of the equivocal nature of the dictum in *Crutcher*, this Court's subsequent decisions in *Rushen* and *Rogers*, and the very substantial distinction between the facts of this case and those in *Crutcher*, it is exceedingly unlikely that the Second Circuit would feel compelled by *Crutcher* to reverse a conviction on the basis of facts like those presented here.

Whereas in *Crutcher* it may have been difficult to determine what contribution the defendant might have made if he had been present during jury selection proceedings, the

facts of this case fully justify the court of appeals' conclusion that the release of certain potential jurors in petitioner's absence "could not have contributed to the verdict." Pet. App. A9. Those jurors were released for reasons—their inability to serve in a lengthy trial during which they were to be sequestered or their statements that they could not serve as fair and impartial jurors—that would have required them to be excused in any event.

The D.C. Circuit reached the same conclusion in a case with strikingly similar facts, *Baker* v. *United States, supra.* In that case, the trial court excused several jurors at a proceeding conducted several days before the commencement of the trial of a notorious political figure. The court mentioned the defendant's name to some of the potential jurors, and it released three individuals for reasons quite similar to those involved here—personal hardship or circumstances establishing that they had formed an opinion on the defendant's guilt or were connected to him or the investigation. 401 F.2d at 965. Finding that those individuals "would have been excused * * * when the case was called for trial in any event," the D.C. Circuit found that "it was at most harmless error to have conducted the [earlier] proceeding in the absence of the defendant." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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